

November 26, 2012

Jawahar Shah
Director of Construction /Associate V.P.
CM/CEI West Transportation
999 Town & Country Road
Orange, CA 92868

Re: Your Request for Informal Assistance
Our File No. I-12-156

Dear Mr. Shah:

This letter responds to your request for advice regarding the revolving door provisions of the Political Reform Act (the "Act").¹ This letter should not be construed as assistance on any conduct that may have already taken place. (See Regulation 18329(b)(8)(A).) In addition, this letter is based on the facts presented. The Fair Political Practices Commission (the "Commission") does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Because your question is general in nature, we are treating your request as one for informal assistance.²

Please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other post-governmental employment laws that may apply including, but not limited to, Public Contract Code Section 10411.

QUESTION

As a former state employee, do the Act's revolving door provisions restrict you from engaging in work on behalf of your new employer related to existing state contracts if you were not involved in any part of the decision-making process relevant to the contracts as a state employee?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

CONCLUSION

The Act's one-year ban prohibits you from appearing before or communicating with your former state employer on behalf of your new employer for the purpose of influencing any administrative or legislative action and any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. Accordingly, you are prohibited from appearing before or communicating with your former state employer on behalf of your new employer for the purpose of influencing any proceeding involving the amendment or revocation of any of the existing contracts you have identified until September 30, 2013.

To the extent that you did not participate as a state employee in proceedings involving the contracts you have identified in any way, the permanent ban does not apply.

FACTS

You are currently employed by AECOM as the Vice President and Director of Construction for Construction Management. You are also a former employee of the Department of Transportation ("Caltrans"). At Caltrans, you held the position of Senior Transportation Engineer/Contract Manager. You retired from Caltrans on September 30, 2012. Currently, you are seeking general guidance regarding any restrictions under the Act that may prohibit you from engaging in work on behalf of your new employer related to existing state contracts nos. 59A0761, 59A0764, 59A550, 44A0045, 07A3262, and 07A3263. Additionally, you have stated that you were "not involved in the negotiations, transactions, planning or arrangements or any part of the decision-making process" relevant to these existing contracts.

ANALYSIS

Under the Act, public officials who leave state service are subject to two types of post-governmental employment provisions known as the one-year ban and the permanent ban. In addition, Section 87407 prohibits certain state and local officials from making, participating in making, or using their official position to influence decisions affecting persons with whom they are negotiating employment or have any arrangement concerning employment. (See Regulation 18747.)³ Colloquially, these provisions are known as the "revolving door" prohibitions.

One-Year Ban

The "one-year ban" prohibits a former state employee from making, for compensation, any formal or informal appearance, or making any oral or written communication, before his or her former agency for the purpose of influencing any administrative or legislative actions⁴ or any

³ You have already left state employment and are currently working for a private employer. Accordingly, we are not providing advice pertaining to Section 87407 at this time.

discretionary act involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. (See Section 87406; Regulation 18746.1.)

The one-year ban applies to any employee of a state administrative agency who holds a position that is designated or should be designated in the agency's conflict-of-interest code. (Section 87406(d)(1); Regulation 18746.1(a)(4).)⁵ The ban applies for twelve months from the date the employee permanently leaves state office or employment.⁶ While in effect, the one-year ban applies only when a former employee or official is being compensated for his or her appearances or communications before his or her former agency on behalf of any person as an agent, attorney, or representative of that person. (Regulation 18746.1(b)(3) and (4).)

In contrast to the permanent ban (discussed below), which only applies to certain "judicial or quasi-judicial" proceedings, the one-year ban applies to "any appearance or communication made for the purpose of influencing administrative or legislative action or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property." (Regulation 18746.1(b)(5)(C).) An appearance or communication is for the "purpose of influencing" if it is made for the "principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding." (Regulation 18746.2.) An appearance or communication includes, but is not limited to, conversing by telephone or in person, corresponding in writing or by electronic transmission, attending a meeting, and delivering or sending any communication. (*Id.*)

⁴ For purposes of Section 87406, the Act defines "administrative action" and "legislative action" as the following:

"'Administrative action' means the proposal, drafting, development, consideration, amendment, enactment, or defeat by any state agency of any rule, regulation, or other action in any ratemaking proceeding or any quasi-legislative proceeding" (Section 82002(a).)

"'Legislative action' means the drafting, introduction, consideration, modification, enactment or defeat of any bill, resolution, amendment, report, nomination or other matter by the Legislature or by either house or any committee, subcommittee, joint or select committee thereof, or by a member or employee of the Legislature acting in his official capacity. 'Legislative action' also means the action of the Governor in approving or vetoing any bill." (Section 82037.)

⁵ A governmental employee should be designated in his or her agency's conflict-of-interest code if the employee makes or participates in making governmental decisions that have a reasonably foreseeable material effect on any financial interest. (Section 87302.)

⁶ For purposes of the one-year ban, the date on which an official permanently leaves office or employment is the date on which the official is no longer authorized to perform the duties of that office or employment, and stops performing those duties. A person shall not be deemed to have left office permanently because he or she is on a leave of absence or serves as an intermittent employee. However, a person shall be deemed to have left office permanently if the person merely receives compensation for accrued leave credits. (Regulation 18746.4(b).)

Finally, appearances and communications are prohibited only if they are (1) before a state agency that the public official worked for or represented; (2) before a state agency “which budget, personnel, and other operations” are subject to the control of a state agency the public official worked for or represented; or (3) before any state agency subject to the direction and control of the Governor, if the official was a designated employee of the Governor’s office. (Regulation 18746.1(b)(6)(C).)

While you have not identified whether your former Senior Transportation Engineer/Contract Manager position was specifically designated in Caltrans’ conflict of interest code, at a minimum, the position should be designated and your post-employment actions on behalf of your new employer, AECOM, are restricted under the one-year ban for 12 months from the date you permanently left Caltrans. As addressed above, the one-year ban applies to any administrative or legislative action and any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. Accordingly, the one-year ban prohibits you from appearing before or communicating with Caltrans, or any representative of Caltrans, on behalf of AECOM for the purpose of influencing any proceeding involving the amendment or revocation of any of the existing contracts you have identified.

Nonetheless, the one-year ban only restricts your activities to the extent that you are making an appearance or communication for the purpose of influencing a legislative or administrative action, or an action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. Appearances or communications, made as part of “[s]ervices performed to administer, implement, or fulfill the requirements of an existing permit, license, grant, contract, or sale agreement are excluded from the [one-year prohibitions] ... provided the services do not involve the issuance, amendment, awarding, or revocation of any of these actions or proceedings.” (Regulation 18746.1(c); *Quiring* Advice Letter, No. A-03-272; *Hanan* Advice Letter, No. I-00-209.) For instance, you would not be prohibited from communicating or appearing before Caltrans to report compliance with the terms of an existing contract or to seek clarification of existing contractual terms so long as you are not seeking to modify the terms.

Permanent Ban

The “permanent ban” prohibits a former state employee from “switching sides” and participating, for compensation, in any specific proceeding involving the State of California or assisting others in the proceeding if the proceeding is one in which the former state employee participated while employed by the state. (Sections 87401 and 87402; Regulation 18741.1.) The permanent ban applies when an official has permanently left or takes a leave of absence from any particular office or employment. (Regulation 18741.1(a)(1).)⁷

⁷ For purposes of the permanent ban, “[t]he date on which an official permanently leaves office or employment or takes a leave of absence is the date on which the official is no longer authorized to perform the duties of the office or employment, and the official stops performing those duties, even if the official continues to receive compensation for accrued leave credits.” (Regulation 18746.4(a)(1).)

The permanent ban is a lifetime ban and applies to any formal or informal appearance or any oral or written communication -- or aiding, advising, counseling, consulting, or assisting in representing any other person, other than the State of California, in an appearance or communication -- made with the intent to influence any judicial, quasi-judicial, or other proceeding in which you participated while you served as a state administrative official. “‘Judicial, quasi-judicial or other proceeding’ means any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency....” (Section 87400(c).) An official is considered to have “participated” in a proceeding if he or she took part in the proceeding “personally, and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation, or use of confidential information....” (Section 87400(d).)

“The permanent ban does not apply to a ‘new’ proceeding even in cases where the new proceeding is related to or grows out of a prior proceeding in which the official had participated. A ‘new’ proceeding not subject to the permanent ban typically involves different parties, a different subject matter, or different factual issues from those considered in previous proceedings.” (*Rist* Advice Letter, No. A-04-187; also see *Donovan* Advice Letter, No. I-03-119.) New contracts with the employee’s former agency in which the former employee did not participate are considered new proceedings. (*Leslie* Advice Letter, No. I-89-649.) A new contract is one that is based on new consideration and new terms, even if it involves the same parties. (*Ferber* Advice Letter, No. I-99-104; *Anderson* Advice Letter, No. A-98-159.) In addition, the application, drafting, and awarding of a contract, license, or approval is considered to be a proceeding separate from the monitoring and performance of the contract, license, or approval. (*Anderson, supra*; *Blonien* Advice Letter, No. A-89-463.)

As a former Caltrans employee, you are a former state employee subject to the permanent ban. Thus, you are permanently prohibited from making an appearance or communication, or from assisting any other person in making an appearance or communication, for compensation, for the purpose of influencing any particular proceeding involving specific parties, such as a Caltrans contract, if you previously participated in the proceeding as a state official. Nonetheless, you have unequivocally stated that you were “not involved in any part of the decision-making process” relevant to any of the contracts you have identified. To the extent that you did participate as a state employee in proceedings involving the contracts you have identified in any way, the permanent ban does not apply.

If you need additional assistance regarding the permanent ban and any proceeding in which you previously participated as a Caltrans employee, please submit a separate advice request providing the details of the particular proceeding.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Brian G. Lau
Counsel, Legal Division

BGL:jgl